No. 83-1096

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

GOMEZ HERMANOS, INC.,
Appellant,

v.

SECRETARY OF THE TREASURY OF PUERTO RICO
Appellee

On Appeal From The Supreme Court Of The Commonwealth Of Puerto Rico

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MOTION TO DISMISS OR TO AFFIRM

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MOTION TO DISMISS OR TO AFFIRM

TO THE HONORABLE COURT:

Now comes the Secretary of the Treasury of the Commonwealth of Puerto Rico, hereinafter named as the appellee, and respectfully moves this Honorable Court to dismiss the appeal in the above entitled case on the grounds that it is not under this Court's jurisdiction and does not present a substantial federal question or, to affirm the judgment of the Supreme Court of the Commonwealth of Puerto Rico on the ground that the questions presented by the appellant are so unsubstantial as not to need further argument.

I. OPINION BELOW

The reference made by Gomez Hermanos, Inc., hereinafter named as the appellant or Gomez, as to the decision below is adopted by appellee.

II. STATEMENT OF THE CASE

A. PROCEEDINGS BELOW

On December 15, 1975 the appellee notified to Gomez a tax deficiency of $1,428,300.20 for the years of 1971, 1972 and 1973. It included the payment of a source tax of 29% that Gomez had to withhold from the payment of interest that it made to a foreign corporation and which Gomez deducted in its income tax returns corresponding to those years. It also included interest and penalties. That deficiency was determined on the ground that Gomez failed to withold that source tax pursuant to 13 L.P.R.A. § 3144. Gomez contested said deficiency notice in the administrative and the judicial levels on the only ground that the assessment of the deficiency violated the due process clause.[1]

The Superior Court found that the aforementioned assessment violated the Due Process Clause of the Constitution of the United States. The Secretary of the Treasury sought review and the Supreme Court of Puerto Rico reversed and found that the assessment of the deficiency in this case does not violate neither the Due Process nor the Commerce clauses of the Constitution of the United States. This appeal followed.

B. BACKGROUND

Gomez is a distributor of Toyota vehicles in Puerto Rico. It has been organized and carries on business within Puerto Rico. Toyota vehicles are manufactured by Toyota Motor Co., and sold by Toyota Motor Sales Co. Both of these companies have been organized and carry on business in Japan.

In order to import vehicles from Japan, Gomez established credit lines with various Japanese banks, all of them having branches in the city of New York. Since those banks do not directly carry out business in Puerto Rico, nor are authorized to carry out business in Puerto Rico, to obtain said credit lines

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[1] A. 1-7. See also Jurisdictional Statement, A. 9.

Gomez was aided by Tozer, Kensley & Millbound, Kabuschiki Kaischa ("Tozer"). Tozer is a Japanese company, subsidiary of Tozer, Kelmsley, Milbound Ltd. of London, England. Tozer, according to the exportation system for Japanese products, is a mediator that acquires the Toyota vehicles and sells them to the holders of franchise in foreign countries according to the regulations of the Ministry of Industry, Trade and Investment of Japan.

To acquire said vehicles Gomez would send its orders to Toyota Motors Sales in Japan with copy to Tozer. Upon receipt of the purchase order thereto, Tozer made endeavors with one of the Japanese banks on behalf of Gomez Hermanos to advance the necessary amount to pay the acquisition expenses and others.

Toyota would forward to Tozer the corresponding invoice. Tozer, after calculating its commission and other expenses, obtained full payment for the invoice from the Japanese bank. Subsequently the Japanese bank would issue a draft on behalf of Gomez Hermanos to be paid at the offices of the drawee bank in New York. Non-negotiable copies of the draft and of the shipping documents were delivered to Tozer.

Upon receipt of the bank draft and the original of the shipping documents, the drawee bank's officers in New York would notify Fernchurch, Tozer's agent. On behalf of Gomez Hermanos, Fernchurch would accept the draft issued and pickup the shipping documents and forward the same. Gomez Hermanos would send on its due date a check on behalf of Fernchurch, drawed against Gomez Hermanos' account with a domestic bank, for the amount of the draft and said amount included interest on the loan thereof. Fernchurch would then pay the Japanese bank.

III. ARGUMENT

A. JURISDICTIONAL STATEMENT

In the present case the Supreme Court of Puerto Rico upheld an assessment of a deficiency notified to Gomez by the

Secretary of the Treasury of the Commonwealth of Puerto Rico for failing to withhold taxes at its origin upon the interest deducted in its income tax return of 1971, 1972 and 1973 and paid to a foreign corporation engaged in interstate commerce.

The case comes now before this Honorable Court on appeal from the judgment of the Supreme Court of Puerto Rico, purporting to have been taken under 28 U.S.C. 1258(2). That provision authorizes an appeal from "final judgments or decrees rendered by the Supreme Court of the Commonwealth of Puerto Rico" when *"the validity of a statute of the Commonwealth of Puerto Rico"* is drawn in question "on the ground of its being repugnant to the Constitution, treaties, or laws of the United States and *"the decision is in favor of its validity."* Emphasis added.

Nowhere in this case, neither in the Superior Court[2] nor in the Supreme Court,[3] has appellant herein challenged the validity *per se* of any statute of the Commonwealth of Puerto Rico.

Either in the Superior Court and before the Supreme Court of Puerto Rico Gomez only contended that the assessment of the deficiency notified by the Secretary of the Treasury for its failing to withhold taxes upon the interest with source within the Commonwealth of Puerto Rico, paid by Gomez to a foreign corporation, violated the Due Process Clause.[4]

This Honorable Court has ruled that it is essential to its appeal jurisdiction that there be an explicit and timely insistence in the state courts that a state statute, as applied, is

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[2] See A.1-7.

[3] See Jurisdictional Statement, A.8.

[4] The obligation of withholding taxes from income with source within the Commonwealth of Puerto Rico is set forth by Sections 144 and 231 of the Income Tax Act of the Commonwealth of Puerto Rico, No. 91 of June 29, 1954 as amended, 13 L.P.R.A. 8144 and 8231. See Appendix E of the Jurisdictional Statement.

repugnant to the Federal Constitution, treaties or laws.[5] Gomez failed to challenge any statute of the Commonwealth of Puerto Rico *per se*.

But even assuming, *arguendo*, that the validity of a statute of the Commonwealth of Puerto Rico under the Constitution of the United States was properly and timely raised or, that it was considered and decided by the courts below, the appeal in this case shall be dismissed because it does not present a substantial federal question.

B. NO SUBSTANTIAL FEDERAL QUESTION

The inherent power of the Legislative Assembly of the Commonwealth of Puerto Rico to impose taxes emanates from Article VI, Section 2 of the Constitution of the Commonwealth of Puerto Rico. That power is subject only to the limitations imposed by its own Constitution and its Bill of Rights which Congress already determined was not inconsistent with the applicable provisions of the Constitution of the United States, and with those obligations which the people of Puerto Rico imposed on itself in accepting the federal relations which were to exist and do exist with the United States pursuant to Act No. 600 of July 3, 1950, 64 Stat. 314.[6] See *R.C.A.* v. *Govt. of the Capital*, 91 P.R.R. 404, 415-416 (1964).

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[5] *Charleston Assn.* v. *Alderson*, 324 US 182, 184-185 (1944), where it was pointed out that "it has long been settled that an attack upon a tax assessment or levy, such as appellants here made, on the ground that it infringes a taxpayer's federal rights, privileges, or immunities, will not sustain an appeal. . . ." (Citations omitted)

[6] Those express limitations are that no duties shall be levied or collected on exports from Puerto Rico; that in levying internal-revenue taxes on articles, goods, wares, or merchandise, the Commonwealth shall make no discrimination between *articles* imported from the United States or foreign countries and similar articles produced or manufactured in Puerto Rico; and to respect the rights, privileges and immunities of the citizens of the United States to the same extent as the citizens of each state enjoy the privileges and immunities of the citizens in different states, under paragraph 1, § 2, Art. IV of the Federal Constitution. Federal Relations Act, §§ 2 and 3; *Postley* v. *Secretary of the Treasury*, 75 P.R.R. 822 (1954). See *R.C.A.* v. *Govt. of the Capital*, supra, 91 P.R.R. at 417.

Although there exist interstate commerce relations between Puerto Rico and the United States neither the internal revenue laws of the United States[7] nor the Interstate Commerce Act[8] are applicable to the Commonwealth of Puerto Rico.

As to the income tax treaties between the United States of America and Japan, neither the treaty of 1954,[9] which was

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[7] See § 9 of the Puerto Rican Federal Relations Act which provides that the United States internal revenue laws do not have force and effect in Puerto Rico, except the Phillipine Trade Act of 1946. In 1959 express consent was granted by Puerto Rico so that the provisions of Section 5314 of the Internal Revenue Code of the United States be effective in Puerto Rico on and after July 1, 1959.

[8] In *R.C.A.* v. *Govt. of the Capital*, supra, 91 P.R.R. at 418-419 it was pointed out by the Supreme Court of Puerto Rico:

> "*. . . Another historical fact is that the constitutional provision which reserves to Congress the power to regulate commerce with foreign nations, between the states and with the Indians tribes, has not only not governed, nor governs, by its own force in Puerto Rico, but, on the contrary, Congress expressly provided that neither the Interstate Commerce Act and the several amendments made or to be made thereto . . . nor an Act to regulate commerce of February 4, 1887, and the Acts amendatory thereof, according to § 38 of the Organic Act of 1917, 39 Stat. 964, and which are still in force as part of the Federal Relations Act, shall apply to Puerto Rico.* Lastly, it is a historical fact that *by express mandate of Congress from the beginning the internal-revenue laws of the United States did not have, nor have, force or validity in Puerto Rico.* Section 14 of the Foraker Act, 31 Stat. 80; § 9 of the Federal Relations Act, 39 Stat. 954.
>
> Naturally, in the past, as at present, there has been interstate commerce relation between Puerto Rico and the United States, *but that relation existed by express provisions of Congress in the exercise of its authority under subd. 2, § 3, Art. IV of the Federal Constitution and at present under Act No. 600.* This interstate commerce relation has constitutionally had, and still has, contours which are different from the relation which under the Constitution prevails among the states of the Union. *That is why even under the former systems Puerto Rico was able to exercise the taxing power, and the Commonwealth may exercise that power at present respecting interstate commerce in a manner that perhaps it would not be permissible to a state covered by the provisions of the Federal Constitution.*" Emphasis added.

[9] *CONVENTION BETWEEN THE UNITED STATES OF AMERICA AND JAPAN FOR THE AVOIDANCE OF DOUBLE TAXATION AND THE PREVENTION OF FISCAL EVASION WITH RESPECT TO TAXES ON INCOME*, PRENTICE-HALL TAX TREATIES, ¶¶ 54, 102 et seq.

effective until 1972, nor the one of 1971,[10] which is effective since January 1, 1973, are applicable to the Commonwealth of Puerto Rico.

As to the treaty of 1954, the taxes which it referred to were:

> "(a) In the case of the United States of America: The Federal income taxes including surtaxes." Prentice-Hall Tax Treaties. § 54, 101.

The treaty of 1954 was applicable to the United States and Japan, and United States was defined as:

> "(a) The term 'United States' means the United States of America and when used in a geographical sense means the States, the Territories of Alaska and Hawaii, and the District of Columbia." § 54, 102.

The treaty of 1971 the taxes which it refers to are:

> "(a) In the case of the United States, the Federal income taxes imposed by the Internal Revenue Code." § 54, 031.

The above mentioned treaty is applicable to the United States and Japan, and United States is defined as:

> "(a) The term "United States" means the United States of America and, when used in a geographical sense means the states thereof and the District of Columbia." § 54, 032.

As can be noted, those treaties are applicable to the Federal income taxes imposed by the Internal Revenue Code of the United States. It is crystal clear that neither the provisions of the Federal income tax law nor the limitations established in the above mentioned treaties are applicable to the Commonwealth of Puerto Rico.

The aforegoing background, demonstrates that the Commonwealth of Puerto Rico is not precluded from making the assessment challenged by appellant in this case and that the

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[10] Id., at 54, 032 et seq.

appeal should be dismissed and the decision of the Supreme Court of Puerto Rico should be affirmed.

Notwithstanding we will pass over the issues raised by appellant to demonstrate that no substantial federal question is present in the case.

In its Jurisdictional Statement Gomez raises the following points: that the tax in question violates the Due Process, Commerce and Equal Protection Clauses of the Constitution of the United States; that it burdens foreign commerce undermining federal uniformity in taxing foreign lenders and subjecting the lenders receiving the interest from sources within Puerto Rico to multiple taxation.

The first point is foreclosed by prior decisions of this Honorable Court. The second point is speculative and baseless.

1. No Violation to The Due Process, Commerce and Equal Protection Clauses.

As to the jurisdiction to tax of a State, the Due Process and Commerce Clauses of the Constitution of the United States requires that there be a minimal connection or nexus between the interstate activity and the taxing State. In other terms, the simple but controlling question is whether the state has given anything for which it can ask return. *Wisconsin* v. *J.C. Penney*, 311 U.S. 435, 444 (1940); *Colonial Pipeline Co.* v. *Traigle*, 421 U.S. 100, 109 (1975); *General Motors Corp.* v. *Washington*, 377 U.S. 436, 440-41 (1964). A state is free to pursue its own fiscal policies unembarrassed by the Constitution, if by the practical operation of a tax it exerts its power in relation to the opportunities that it brings. *Colonial Pipeline Co.* v. *Traigle*, supra.

Since long ago this Honorable Court has ruled that the source of the income, that is, the place of the accrual of the income, is a basis of jurisdictions to levy an income tax in the

case of foreign individuals and corporations.[11] In other words, the subject of the tax is the income earned within the State.

The source of the income is so important that in different groups of experts many of them have agreed that interest should be taxed where earned and, it has been recognized that source countries would utilize flat rate withholding taxes on gross interest.[12]

Appellant herein does not dispute the fact that the income object of the case has its source within the Commonwealth of Puerto Rico. Thus, there is no doubt as to the fact that in the instant case we are dealing exclusively with a tax upon an income the geographical source of which is easily identifiable as being within Puerto Rico.[13] Since Puerto Rico taxes the income with source within it exclusively, no apportionment is necessary.

Appellant does not either contest the fact that the investment transactions of the foreign institutions and the interest which Gomez payed to them are fairly related to their investment and to Gomez activities in Puerto Rico which gave rise to the income that made possible the payment to the foreign

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[11] *Commissioner* v. *Wodehouse*, 337 U.S. 369, 380 (1949); *Helvering* v. *Stockholms Enskilda Bank*, 293 U.S. 84 (1934); *Wisconsin* v. *J.C. Penney Co.*, 311 U.S. 435, 437 (1940), *International Harvester Co.* v. *Dept. of Taxation*, 322 U.S. 435, 445 (1944); *Memphis Gas Co.* v. *Stone*, 335 U.S. 80, 96 (1948); *Colonial Pipeline Co.* v. *Traigle*, 421 U.S. 100, 111 (1975); *Mobil Oil Corp.* v. *Commissioner of Taxes*, 445 U.S. 425 (1980); *Exxon Corporation* v. *Wisconsin Dept. of Revenue*, 447 U.S. 207 (1980).

[12] Surrey, *United Nations Group of Experts and the Guideline for Tax Treaties Between Developed and Developing Countries*, 19 Harv. Int'l. L. J. 1 (1978), pp. 26-27. See also Rudolf, *State Taxation of Interstate Business, The Unitary Business Concept and Affiliated Corporate Groups;* 25 Tax Law Review 171, 181 (1970) where it is pointed out that "The basic proposition can be simply stated: *At least as far as nondomiciliary corporations are concerned, a state may only tax income arising from sources within the state. . . .*" Emphasis added.

[13] *National Geographic* v. *California Equalization Bd.*, 430 U.S. 551, 558 (1977); *Mobil Oil Corp.* v. *Commissioner of Taxes*, 445 U.S. 425 (1980).

institutions. Both, the lenders who received the payments of interest made by Gomez and Gomez, took and are taking advantage of the exploitation of the consumer market through the commercial activity of sale of automobiles in Puerto Rico.[14]

As it has been stated by this Honorable Court, the personal presence of a person or institution in a state is not necessary if the source of an income paid to that non-resident or foreign is fairly attributable to events or transactions which took place within the State and entitled to the benefits which it confers.[15]

As it was pointed out by this Honorable Court in *Curry* v. *McCanless*, 307 U.S. 357, 365-66 (1939).

> "Very different considerations, both theoretical and practical, apply to the taxation of intangibles, that is, rights which are not related to physical things. Such *rights are but relationships between persons, natural or corporate, which the law recognizes by attaching to them certain sanctions enforceable in courts*. The power of government over them and the protection which it gives them cannot be exerted through control of a physical thing. They can be made effective only *through control over and protection afforded to those persons whose relationships are the origin of the rights*. See *Chicago, R.I. & P. Ry. Co.* v. *Sturm*, 174 U.S. 710, 716; *Harris* v. *Balk*, 198 U.S. 215, 222. *Obviously, as sources of actual or potential wealth—which is an appropriate measure of any tax imposed on ownership or its exercise—they cannot be dissociated from the persons from those relationships they are derived. These are not in any sense fictions. They are indisputable realities.*" (Emphasis added.)

Appellant also alleges that the tax at issue herein is a direct tax on the interstate and foreign commerce.[16] That assertion is

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[14] *Miller Bros Co.* v. *Maryland*, 347 U.S. 340, 347 (1954).

[15] *International Harvester Co.* v. *Dept. of Taxation*, supra., 322 U.S. at 441-443; *Curry* v. *McCanless*, 307 U.S. 357 (1939).

[16] Appellant makes that assertion relying upon the cases of *National Geographic Society* v. *California*, 430 U.S. 551 (1977) and *National Bellas Hess* v. *Department of Revenue*, 386 U.S. 753 (1967). But those cases do not

misplaced because the tax at issue is not a privilege tax or a condition precedent to the right of the taxpayer to carry on investment transactions in Puerto Rico or for the privilege of engaging in the interstate or foreign commerce. See *Portland Cement Co.* v. *Minnesota*, 358 U.S. 450 (1959) where it was settled that when a taxpayer makes that kind of averment it must prove that the tax places a burden on interstate or foreign commerce in a constitutional sense. See also *Wisconsin* v. *Minnesota Min. Mfg. Co.*, 311 U.S. 452, 453 (1940); *Underwood Typewriter Co.* v. *Chamberlain*, 254 U.S. 113, 119 (1920); *Railway Express Agency* v. *Commonwealth of Virginia*, 358 U.S. 434 (1959); *Colonial Pipeline Co.* v. *Traigle*, 421 U.S. 100, 113 (1975); *Northwestern Cement Co.* v. *Minn.*, 358 U.S. 450, 461-462 (1958). The tax herein involved is applicable not only to foreign corporations, but also to individuals (13 L.P.R.A. 3143) that receive income from sources in Puerto Rico, whether they are or not carrying on business in the interstate or foreign commerce. The basis for the imposition of the tax is that the beneficiaries are receiving income produced by transactions or activities within the Commonwealth of Puerto Rico, which make it possible because it has the advantages of a civilized society and a stable government upon which those beneficiaries rely and for which they must pay their just share.

And as this Honorable Court has stated, the mere act of carrying on business in interstate or foreign commerce does not exempt a corporation from state taxation of income from sources within a specific state, even though it increases the cost of doing business. *Colonial Pipeline Co.* v. *Traigle*, 421

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sustain its position. Both cases involved the imposition of use tax collection duty to out of state corporations. In the first one this Court found that the imposition of that duty was constitutional because of the connection between the corporation and the state. In the other case the connections were not sufficient for the imposition of the use tax collection duty. That is not the situation in the present case where the withholding duty is imposed to a local corporation.

U.S. 100, 108 (1975); *Western Line Stock* v. *Bureau of Revenue*, 303 U.S. 250, 254 (1938); *General Trading Tax Comm'n*, 322 U.S. 327, 338 (1944).

This Honorable Court has also distinguished between a tax whose subject is the privilege of engaging in interstate commerce, also applicable to foreign or international commerce on these modern times, and a tax whose subject is the *income* from such commerce. It is settled by decisions of this Court that a tax on income from interstate commerce, also applicable to foreign commerce, as distinguished from a tax on the privilege of engaging in interstate commerce, does not conflict with the commerce clause. *Container Corp. of America* v. *Franchise Tax Com.*, 103 S.Ct. 2933 (1983).

Concluding, the foregoing analysis clearly shows that the tax object of the case does not violate neither the Due process nor the Commerce clauses of the Constitution of the United States.

Appellant also alleges now that the source tax rate applicable to non-resident corporations creates a local favoritism, gives commercial advantages to local business and discriminates against interstate commerce. We respectfully disagree with that assertion.

That argument is defeated by the fact that the same source tax rate is applicable to non-resident individuals to which payments are made from sources within Puerto Rico,[17] whether they are engaged or not in commerce.

Moreover, the Constitution of the United States does not impede the states from making reasonable classifications of persons, property, corporations or other objects for the purpose of imposing taxes.[18] It has been long ago established that

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[17] 13 L.P.R.A., Sec. 3143.

[18] *Rapid Transit Corp.* v. *New York*, 303 U.S. 573, 578 (1937); *McGowan* v. *Maryland*, 366 U.S. 420, 426 (1961); *Massachusetts Board of Retirement* v. *Murgia*, 427 U.S. 307 (1976).

the Equal Protection Clause does not impose to the State a rigid rule in the classifications of the subjects for the imposition of taxes. *Carmichael* v. *Southern Coal Co.*, 301 U.S. 495, 509 (1936); *Bell's Gap R. Co.* v. *Pennsylvania*, 134 U.S. 232, 237 (1890); *Lawrence* v. *State Tax Comm'r.*, 286 U.S. 276, 284 (1932).

It has been also settled that upon creating classes the action of the legislative power should be presumed valid. *Rapid Transit* v. *New York*, 303 U.S. 573 (1937); *Rast* v. *Van Deman & Lewis Co.*, 240 U.S. 342, 357 (1916); *Borden's Co.* v. *Baldwin*, 293 U.S. 194, 209 (1934); *Metropolitan Casualty Ins. Co.* v. *Brownell*, 294 U.S. 580, 584 (1935). Thus, appellant had the burden of establishing that the classification that it now challenges as being discriminatory is unconstitutional. *Charleston Assn.* v. *Alderson*, supra, 324 U.S. at 190-191. Appellant herein has failed to establish that the rate of the source tax applicable to non-resident corporations not making business in Puerto Rico constitutes an irrational or unreasonable classification.

On the contrary, that is a reasonable classification which the legislative assembly is empowered to make. This has been recognized by this Honorable Court when it stated in *Commissioner* v. *Wodehouse*, supra, 337 U.S. 369, 379 that there could be no doubt that the corporations doing business in a State contribute in a much more substantial degree to the support of the people and the government[19] than those which are not doing business in the State.

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[19] This assertion is also supported by appellants argument at pages 18-20 of the Jurisdictional Statement which demonstrates that the banks doing business in Puerto Rico, aside from the contributions they make to the economy of Puerto Rico, for instance, in the field of employment, economic and industrial development etc., they have to pay not only income taxes, but also franchise taxes, property taxes, municipal license taxes, etc. Thus, to relieve the foreign banks from the rate of source tax at issue herein would have a depressive effect on wholly local banks. *Wisconsin* v. *J.C. Penney*, supra, 311 U.S. at 442.

2. No Impermisible Burden on Foreign Commerce and No Risk of Multiple Taxation

Appellant sustains that the source tax herein involved impairs Federal uniformity in fashioning policy for trade with Japan and, subjects the banks to a risk of multiple taxation.

Appellant's first contention is foreclosed by prior decisions of this Honorable Court and the second one is quite speculative.

In appellant's first contention it sustains that the Government of the United States has pre-empted the field of taxation of income of foreign banking institutions with source within Puerto Rico.

It has been formerly showed that none of the two income tax treaties between the United States and Japan were made extensive to the Commonwealth of Puerto Rico. And it has been pointed out by this Honorable Court that:

> ". . . Concurrent federal and state taxation of income, of course, is a well-established norm. Absent some explicit directive from Congress, we cannot infer that treatment of foreign income at the federal level mandates identical treatment by the States. The absence of any explicit directive to that effect is attested by the fact that Congress has long debated, but has not enacted, legislation designed to regulate state taxation of income. . . . Congress in the future may see fit to enact for state taxation of foreign dividends. To date, however, it has not done so." *Mobil Oil Corp.* v. *Commissioner of Taxes*, supra, 445 U.S. at 448-49. See also *Container Corporation of America* v. *Franchise Tax Board*, 103 S. Ct. 2933, 2956 (1983).

This Honorable Court has also stated that in cases such as this, it is necessary to look beyond general expressions of "national policy" to specific federal statutes with which the State or the Commonwealth of Puerto Rico law is claimed to conflict. *Commonwealth Edison Co.* v. *Montana*, 453 U.S. 609, 634 (1981).

Concluding, since the tax involved herein is a tax on income with source within Puerto Rico, it was the Commonwealth of Puerto Rico and not the United States that gave the protection and the adequate conditions for the rise of that income and it is entitled to compensation. *Colonial Pipeline Co.* v. *Traigle*, supra, 421 U.S. at 111; *Memphis Gas Co.* v. *Stone*, supra, 335 U.S. at 96.

As to the contention of the alleged risk of multiple taxation it has been reiteratedly ruled by this Honorable Court that the taxpayer has the "distinct burden of showing by 'clear and cogent evidence' than the challenged tax results in extraterritorial values been taxed, that it burdens interstate or foreign commerce or that it creates a risk of multiple taxation. *Container Corp. of America* v. *Franchise Tax Bd.*, 103 S. Ct. 2933 (1983); *Exxon Corp.* v. *Wisconsin Dept. of Revenue*, 447 U.S. 207 (1980); *Standard Steel Co.* v. *Wash Revenue Dept.*, 419 U.S. 560, 565 (1975).

Appellant herein has not made such showing in the instant case.

As in the case of *Mobil Oil Corp.* v. *Commissioner of Taxes*, supra, 445 U.S. at 444, actual multiple taxation is not demonstrated in the record of this case.

Appellant tries to make applicable to this case the decision of this Honorable Court in the case of *Japan Line, Ltd.* v. *County of Los Angeles*, 441 U.S. 434 (1979).

But that case and the instant case are distinguishable.

In the *Japan Line* case, aside from the fact that it did not involve a tax on income, the record demonstrated that Japan taxed in full the property which that case referred to.

In the present case Gomez contention is speculative because first, appellant did not even raise that point before the courts of the Commonwealth of Puerto Rico and, second, the record does not establish whether the income with source within Puerto Rico was or is partially or totally taxed by Japan. Consequently, as it was stated by this Honorable Court in

Moorman Mfg. Co. v. *Bair*, 437 U.S. 267, 280 (1978), it would be an exercise in formalism to declare inconstitutional the source income tax assessment herein at issue based on speculative concerns with multiple taxation.

Since the instant case only involves the challenge to an assessment of a tax deficiency pursuant to a local law which does not conflict with any clause of the Constitution of the United States, it does not involve a substantial federal question. It only presents a matter of local law. And it has been repeatedly held that the Supreme Court of Puerto Rico should not be reversed in a matter of local law unless the court's determination is "inescapably wrong" or "patently erroneous." *Sancho Bonet* v. *Texas Co.*, 308 U.S. 463 (1940); *De Castro* v. *Board of Commissioners*, 322 U.S. 451 (1944); *C. Brewer P.R.* v. *Corchado*, 303 F 2d 645 (1962); *Acosta Marrero* v. *Commonwealth of Puerto Rico*, 275 F 2d 294 (1960); *Fullana Corp.* v. *P.R. Planning Board*, 257 F 2d 355 (1958); *Marquez* v. *Aviles*, 252 F 2d 715 (1958); *Iglesias Acosta* v. *Secretary of Finance of Puerto Rico*, 220 F 2d 651 (1955); *Sagastivelza* v. *P.R. Ins.* 171 F 2d 563 (1949); *Compose* v. *Central Cambalache, Inc.* 157 F 2d 43 (1946); *Fornaris* v. *Ridge Tool Co.*, 400 U.S. 41 (1970).

CONCLUSION

Inasmuch as the Supreme Court of the Commonwealth of Puerto Rico correctly determined that the assessment of deficiency at issue in the present case is valid and violates no constitutional provisions, no substantial federal question is presented herein and this Honorable Court should dismiss this appeal and summarily affirm the decision below.

Respectfully submitted,

San Juan, Puerto Rico, March 8, 1984

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APPENDIX

APPENDIX A

IN THE SUPERIOR COURT OF PUERTO RICO
SAN JUAN PART

(Translation)
EXHIBIT III

Civil No. 77-7967 (1003)

GOMEZ HERMANOS, INC.,

Plaintiff

v.

SECRETARY OF THE TREASURY
OF PUERTO RICO

Defendant

Re:
Review of Administrative
Ruling on Tax Deficiency

COMPLAINT

Comes now the plaintiff, through its undersigned attorneys, before this Hon. Court and respectfully states and prays:

1. That plaintiff is a corporation duly organized under the Laws of the Commonwealth of Puerto Rico, with main offices in San Juan, Puerto Rico, and engaged in the purchase and sale of new and used automobiles.

2. That on December 15, 1975, the Secretary of the Treasury of Puerto Rico, through Pedro Nicot Santana and Candido Rodriguez Reyes, notified plaintiff herein of a tax deficiency for the years 1971, 1972, and 1973, totalling $1,428,300.20, alleging that the same refers to a tax deficiency withheld at the source. A photocopy of said communication is attached hereto and made part of this complaint, marked Exhibit "A", for purposes of its identification.

3. That immediately after receiving said Notice of Deficiency, plaintiff raised objection to the same and requested an

administrative hearing which was finally held on September 10, 1976; and that on October 20, 1977, the plaintiff herein was served with the Final Notice of Deficiency which notified a final deficiency of $1,587,989.83, for a tax deficiency withheld at the source. A photocopy of said Final Notice of Deficiency is attached hereto and made part of this Complaint, marked Exhibit "B", for purposes of its identification.

4. That on November 9, 1977, plaintiff herein filed before defendant a Petition for Reconsideration of the aforementioned Final Notice of Deficiency. A photocopy of said Petition for Reconsideration is attached hereto and made part of this Complaint, marked Exhibit "C", for purposes of its identification.

5. That on November 14, 1977, plaintiff again addressed defendant with regard to its Petition for Reconsideration, requesting an extension of time to file the corresponding bond required by Law in order to perfect the Petition for Review which is proper at law. A photocopy of said communication is attached hereto and made part of this Complaint, marked Exhibit "D", for purposes of its identification.

6. That on November 14, 1977, the reconsideration requested by plaintiff was denied by Fred H. Martinez, Director of the Income Tax Bureau, which denial was notified to plaintiff on November 16 of that same year. A photocopy of said communication is attached hereto and made part of this Complaint, marked Exhibit "E", for purposes of its identification.

7. That the Notice of Deficiency served by defendant on plaintiff Gomez Hermanos, Inc. is erroneous and should be set aside on the following:

GROUNDS

a) Plaintiff Gomez Hermanos, Inc. did not pay any sort of interest to Fenchurch Corporation during the tax years in controversy, or at any other time, hence it is not bound to withhold any sum from said corporation in Puerto Rico.

b) Fenchurch Corporation is an agent and/or assignee of plaintiff to, in its name and in representation thereof, carry out business transactions in the sale and purchase of Japanese automobiles.

c) Fenchurch Corporation is not engaged in the financing business but renders certain services to Japanese banks and financial institutions, receiving from said institutions, and not from plaintiff herein, commissions to that effect, and, since these services were rendered outside Puerto Rico, they are not subject to local taxation.

d) As a consequence of plaintiff's arrangement with the Japanese institutions from which it buys motor vehicles, and with Japanese banks or institutions that offer financing, Fenchurch Corporation, which has no business or property of any kind in Puerto Rico, is used as agent, and all payments made by plaintiff to Fenchurch Corporation are not for the latter but destined to Japanese institutions, and Fenchurch Corporation's only intervention is as agent of plaintiff outside Puerto Rico and of the Japanese entities doing business with plaintiff in order to deliver the latter's payments.

e) The payments made by plaintiff to Fenchurch Corporation are not payments of interest as claimed by defendant, but, on the contrary, are destined for Japanese financial entities, which payments are not subject to tax withholding at their source since the same are meant for settling the balance of a transaction performed outside Puerto Rico with Japanese entities, and from which payments plaintiff is not required by law to withhold any taxes.

f) According to plaintiff's arrangements with the Japanese car manufacturers and financers, plaintiff is financed by a group of Japanese banks and/or financial institutions which in turn are bonded by a subdivision of the Japanese Government, without plaintiff having to post any bond inside or outside Puerto Rico, and since these transactions were performed outside Puerto Rico with Japanese entities that are not subject to taxation in Puerto Rico, plaintiff is not required to withhold any taxes at the source.

g) The Income Tax Act of Puerto Rico does not require that any taxes be withheld at the source over any business transaction used by plaintiff in the purchase and sale of Japanese automobiles since said transactions not only do not generate income in Puerto Rico, but also Puerto Rico lacks power to tax the same since there are no contacts and/or ties between the transactions stemming from the payment of interest to the Japanese entities involved, or ties and links between Puerto Rico and the securement of the interest that justify taxation in what concerns the constitutional rule of due process of law.

h) There are no factors which would justify the nexus and ties necessary to withhold taxes at the source because of the following:

1. Gomez Hermanos, Inc. and the Japanese banks are corporations independent of each other and their transactions were not conducted on a personal basis.

2. The Japanese banks involved are foreign corporations not doing business in Puerto Rico and have no ties whatsoever with Puerto Rico.

3. There is no promissory note or evidence of debt in Puerto Rico.

4. The transactions which may have led to payment of interest were carried out entirely outside Puerto Rico.

5. The interest and the principal involved were paid by the debtor to the creditor outside Puerto Rico.

6. There has not been a single event where the Japanese banks can invoke protection of the laws of Puerto Rico with regard to the transactions made.

i) That in the alternative that plaintiff is forced to pay any deficiency, which it refuses to do, the deficiency notified is excessive since the Secretary has computed the interest and penalties in a way that does not follow the provisions of the Law.

8. That plaintiff is taking the necessary steps to post the bond required by the Secretary of the Treasury as a requirement for filing this Complaint.

9. That plaintiff does not owe the deficiency sums claimed in this case by the Secretary of the Treasury and, hence, has not paid them, and that this Hon. Court should annul the same.

WHEREFORE, we pray this Hon. Court to annul the deficiency notified to plaintiff by defendant Secretary of the Treasury of Puerto Rico, and to make any other pronouncement necessary for legal purposes.

WE CERTIFY that, in addition to personally summoning defendant as required by Law, we are sending him today a carbon copy of this Complaint and a photocopy of the attached Exhibits through certified mail with return receipt to its address at Edificio Intendente Ramirez, San Juan, P.R. 00901.

San Juan, Puerto Rico, this 17th Day of November 1977.

OTERO SURO & OTERO SURO

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CHIEF CLERK'S CERTIFICATE

I, Lady Alfonso de Cumpiano, Chief Clerk of the Supreme Court of Puerto Rico, DO HEREBY CERTIFY:

That the annexed document is a photocopy of the official translation from Spanish into English of the Complaint dated November 17, 1977, filed before the Superior Court of Puerto Rico, San Juan Part, in civil case No. 77-7967 (1003), Gomez Hermanos, Inc., Plaintiff, *v.* Secretary of the Treasury of Puerto Rico, Defendant, said translation having been made under the authority of Act No. 87 of May 31, 1972, from the Spanish copy which appears of record in case No. R-82-481, before this Court.

IN WITNESS WHEREOF, and at the request of the Department of Justice of Puerto Rico, I issue these presents for official use, free of charge, under my hand and the seal of this Court, in San Juan, Puerto Rico, this 29th day of February 1984.

/s/ Lady Alfonso de Cumpiano
LADY ALFONSO DE CUMPIANO
Chief Clerk
Supreme Court of Puerto Rico